



**Rules and Ancillary Document Review Checklist**  
**(This form must be filled out electronically.)**

All responses should be in **bold** format.

Document Reviewed (include title): **WAC 458-20-194 Doing business inside and outside the state.**

Date last adopted: **3/30/83**

Reviewer: **Cindy Evans**

Date review completed: **9/19/00**

Is this document being reviewed at this time because of a taxpayer or business association request? (If "YES", provide the name of the taxpayer/business association and a brief explanation of the issues raised in the request). YES ☐ NO ☒

Type an "x" in the column that most correctly answers the question, and provide clear, concise, and complete explanations where needed.

**1. Explain the goal(s) and purpose(s) of the document:**

**The goal and purpose of WAC 458-20-194 is to explain the application of RCW 82.04.460, Business within and without state--Apportionment. The rule sets out when a domiciled or non-domiciled person is doing "business" inside or outside of Washington. It also explains what income is to be included or excluded in the B&O and public utility tax computation.**

**2. Need:**

YES	NO	
<b>X</b>		Is the document necessary to comply with the statutes that authorize it? (E.g., Is it necessary to comply with or clarify the application of the statutes that are being implemented? Does it provide detailed information not found in the statutes?)
	<b>X</b>	Is the document obsolete to a degree that the information it provides is of so little value that the document warrants repeal or revision?
	<b>X</b>	Have the laws changed so that the document should be revised or repealed? (If the response is "yes" that the document should be repealed, explain and identify the statutes the rule implemented, and skip to Section 10.)
<b>X</b>		Is the document necessary to protect or safeguard the health, welfare (budget levels necessary to provide services to the citizens of the state of Washington), or safety of Washington's citizens? (If the response is "no", the recommendation must be to repeal the document.)



Please explain. **This rule is needed because it provides apportionment guidance to businesses that do business inside and outside Washington regarding what income is subject to B&O tax.**

**3. Related ancillary documents, court decisions, BTA decisions, and WTDs: Complete** Subsection (a) only if reviewing a rule. Subsection (b) should be completed only if the subject of the review is an ancillary document. Excise Tax Advisories (ETAs), Property Tax Bulletins (PTBs) and Audit Directives (ADs) are considered ancillary documents.

(a)

YES	NO	
X		Are there any ancillary documents that should be incorporated into this rule? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
X		Are there any ancillary documents that should be repealed because the information is currently included in this or another rule, or the information is incorrect or not needed? (An Ancillary Document Review Supplement should be completed for each and submitted with this completed form.)
X		Are there any Board of Tax Appeal (BTA) decisions, court decisions, or Attorney Generals Opinions (AGOs) that provide information that should be incorporated into this rule?
X		Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) that provide information that should be incorporated into the rule?

(b)

YES	NO	
		Should this ancillary document be incorporated into a rule?
		Are there any Board of Tax Appeal (BTA) decisions, court decisions, or Attorney Generals Opinions (AGOs) that affects the information now provided in this document?
		Are there any administrative decisions (e.g., Appeals Division decisions (WTDs)) that provide information that should be incorporated into the document?

If the answer is “yes” to any of the questions in (a) or (b) above, identify the pertinent document(s) and provide a brief summary of the information that should be incorporated into the document.

**The following Board of Tax Appeals case, determinations, and ETAs should be incorporated into Rule 194:**

- ***Foster Pepper & Shefelman v. State of Washington, Department of Revenue, Docket No. 54866, June 2, 2000.*** To apportion its service income, a taxpayer must either



**maintain a place of business in another state or country or render services out-of-state that are more than "incidental."**

- **Determination No. 89-525, 8 WTD 411 (1989) - A "place of business" held to include the home of the Washington employee/shareholder of an out-of-state independent sales representative. A formal office is not required.**
- **Determination No. 89-553, 9 WTD 039 (1989); Determination No. 93-132, 13 WTD 271 (1994) - A taxpayer who does not maintain a place of business outside the state is entitled to apportion service income when the out-of-state services performed are more than incidental.**
- **Determination No. 92-262E, 12 WTD 431 (1992) - A taxpayer is entitled to apportion its gross receipts between Washington and other state(s) only if the taxpayer is directly and actively engaged in business in the other state(s) and from such activity it derives some part of its gross receipts. When a taxpayer's sole connection with another state is the payment of third party service provider costs, the taxpayer is not entitled to apportion out the costs associated with that service provider. When a Washington taxpayer contracts with independent businesses in other states to perform services in those states for the taxpayer's purpose of realizing or continuing valuable contractual relationships there, nexus may be found. However when the independent businesses are not chosen because of their location or to enter and maintain a place in the market of the other state, but rather for their independent expertise, then nexus is not created.**

**An apportionment formula is required only when another state may constitutionally impose a tax. When no other state may constitutionally tax the activities of a Washington business, the state of Washington may tax 100% of its gross receipts. The costs incurred by a Washington business for the acquisition of third party services must be attributed to the state which generates the business to which the services relate.**

- **ETA 019.04.194 Engaging In Business Within The State. When an out-of-state contractor has employees permanently assigned to Washington and is doing business and engaging in business in this state, the income derived is subject to B&O tax.**
- **ETA 269.04.194 Out-Of-State Engineering Firm Performing Services In This State Which Are Incidental To Those Performed By Its Out-of-State Office. Services which are "incidentally rendered" in Washington as part of a business conducted from an out-of-state situs are not subject to the excise taxing jurisdiction of Washington. [While this information is in the current rule, the wording can be improved to clarify the point.]**
- **ETA 270.04.194 Interest Income Derived From The Extension Of Credit To A Party In Another State By A Washington Taxpayer With Business Situs In Both**



**States.** Apportionment of income between the states in which business situs exists is appropriate only if each business situs contributes to the production of income.

- **ETA 280.04.193/194 Commissions Earned On Interstate Sales.** Interstate sales commissions earned by a taxpayer whose domicile and his or her place of business is located in Washington are subject to B&O tax.
- **ETA 324.04.194/224 Application Of Business And Occupation Tax To Royalty Income Earned Through Grant Of Patent Privileges.** A patent is an intangible and the royalty income from the patent is attributable to the owner's commercial and/or legal domicile.

The following ETA can be repealed:

- **ETA 027.04.194 Testing And Engineering Services By An Out-of-State Corporation.** An out-of-state corporation with employees permanently assigned to Washington to maintain government owned test equipment received reimbursements in advance for all costs and expenses but without any additional fees or profit. Receipt of reimbursements for services rendered within this state is taxable as gross income for B&O tax notwithstanding that no profit is realized or that such amounts are termed advances.

The information covered in this ETA is sufficiently covered in RCW 82.04.080 and 82.04.220, Determination No. 86-298, 2 WTD 29 (1986), and *Budget Rent-A-Car v. Department of Revenue*, 81 Wn2d 171, 500 P.2d 764 (1972). Therefore, the department should repeal this ETA.

#### 4. Clarity and Effectiveness:

YES	NO	
X		Is the document written and organized in a clear and concise manner?
X		Are citations to other rules, laws, or other authority accurate? (If no, identify the incorrect citation below and provide the correct citation.)
X		Is the document providing the result(s) that it was originally designed to achieve? (E.g., does it reduce the need for taxpayers to search multiple rules or statutes to determine their tax-reporting responsibilities, help ensure that the tax law and/or exemptions are consistently applied?)
	X	Do changes in industry practices warrant repealing or revising this document?
	X	Do any administrative changes within the Department warrant repealing or revising this document?

Please explain. **The department should consider revising this rule. While it is clear, there are examples in the rule that no longer reflect the department's interpretation of RCW 82.04.460. Specifically, the rules states:**

**For example, persons domiciled herein, but having no place of business outside this state, are taxable upon the following types of income:**

...



(2) An attorney upon fees received from persons without the state, even though a portion of his services were necessarily performed without the state.

...

(4) An accountant upon income received from persons for services performed without the state.

...

(9) A physician upon income received from the treatment of patients without the state.

**Determination No. 87-186, 3 WTD 195 (1987), held that apportionment may not be denied solely because a taxpayer does not maintain a place of business outside of Washington. A taxpayer who does not maintain a place of business outside the state is entitled to apportion service income when the out-of-state services performed are more than incidental. Determination No. 89-553, 9 WTD 039 (1989). As the out-of-state services performed in these examples appear to be “more than incidental,” the examples should be removed.**

**5. Intent and Statutory Authority:**

YES	NO	
X		Does the Department have sufficient authority <b>to adopt</b> this document? (Cite the statutory authority in the explanation below.)
X		Is the document consistent with the legislative intent of the statutes that authorize it? (I.e., is the information provided in the document consistent with the statute(s) that it was designed <b>to implement</b> ?) If “no”, identify the specific statute and explain below. List all statutes being implemented in Section 9, below.)
	X	Is there a need to recommend legislative changes to the statutes being implemented by this document?

Please explain. **RCW 82.32.300 authorizes the Department of Revenue to make and publish rules.**

**6. Coordination:** Agencies should consult with and coordinate with other governmental entities that have similar regulatory requirements when it is likely that coordination can reduce duplication and inconsistency.

YES	NO	
	X	Could consultation and coordination with other governmental entities and/or state agencies eliminate or reduce duplication and inconsistency?

Please explain. **No other governmental entities or state agencies have similar regulatory requirements.**

**7. Cost:** When responding, consider only the costs imposed by the document being reviewed and not by the statute.

YES	NO	
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	<b>X</b>	Have the qualitative and quantitative benefits of the document been considered in relation to its costs? (Answer "yes" only if a Cost Benefit Analysis was completed when the rule was last adopted or revised.)
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Please explain. **This is an interpretive rule that imposes no new or additional administrative burdens on businesses that are not imposed by law.**



**8. Fairness:** When responding, consider only the impacts imposed by the document being reviewed and not by the statute.

YES	NO	
X		Does the document result in equitable treatment of those required to comply with it?
	X	Should it be modified to eliminate or minimize any disproportionate impacts on the regulated community?
	X	Should the document be strengthened to provide additional protection to correct any disproportionate impact on any particular segment of the regulated community?

Please explain. **The statutes and rule affect all similarly situated taxpayers in the same fashion.**

**9. LISTING OF DOCUMENTS REVIEWED:** (Use “bullets” with any lists, and include documents discussed above. Citations to statutes, ancillary documents, and similar documents should include titles. Citations to Attorneys General Opinions (AGOs) and court, Board of Tax Appeals (BTA), and Appeals Division (WTD) decisions should be followed by a brief description (i.e., a phrase or sentence) of the pertinent issue(s).)

Statute(s) Implemented:

- **RCW 82.04.460(1) Business within and without state--Apportionment.**

**The following statutes are implemented by Rule 194 as it applies generally to those persons doing business inside and outside of the state of Washington:**

- **RCW 82.04.150 "Engaging in business."**
- **RCW 82.04.220 Business and occupation tax imposed.**
- **RCW 82.16.020 Public utility tax imposed -- Additional tax imposed -- Deposit of moneys.**

Ancillary Documents (i.e., ETAs, PTBs, and ADs):

- **ETA 019.04.194 Engaging In Business Within The State.**
- **ETA 027.04.194 Testing And Engineering Services By An Out-Of-State Corporation.**
- **ETA 269.04.194 Out-Of-State Engineering Firm Performing Services In This State Which Are Incidental To Those Performed By Its Out-Of-State Office.**
- **ETA 270.04.194 Interest Income Derived For The Extension Of Credit To A Party In Another State By A Washington Taxpayer With Business Situs In Both States.**
- **ETA 280.04.193/194 Commissions Earned On Interstate Sales.**
- **ETA 324.04.194/224 Application Of Business And Occupation Tax To Royalty Income Earned Through Grant Of Patent Privileges.**

Court Decisions:



***Dravo Corp. v. Tacoma*, 80 Wn.2d 590, 496 P.2d 504 (1972). RCW 82.04.460, and similar ordinances providing for apportionment of tax liability, not applicable when a taxable event occurs entirely within the taxing jurisdiction.**

***Pacific First Fed. v. State of Washington, Department of Revenue*, 92 Wn.2d 402, 598 P.2d 387 (1979). RCW 82.04.460 and implementing regulations are applicable to income produced by a financial institution's acts of investing taking place in this state when some of the funds invested result from service activities outside the state.**

Board of Tax Appeals Decisions (BTAs):

***All Alaskan Seafoods International, Inc. and UNISEA International, Inc. v. State of Washington, Department of Rev.*, Docket No. 96-92, May 27, 1998. If a company's activities in another state are sufficient to confer, as a matter of Due Process Clause and Commerce Clause jurisprudence, jurisdiction in that other state to impose a B&O tax measured by gross receipts derived from the same activities in that other state, then Washington must provide a means of apportioning that income.**

***Simpson Timber Company, Simpson Export Sales co. and Simpson Properties, Inc. v. State of Washington, Department of Revenue*, Docket No. 30192 A, B, C, November 5, 1986. A domestic international sales corporation organized pursuant to Internal Revenue Code sections 991 through 997, which has no employees, payroll, inventory of goods, warehouses and no office and whose only functions are bookkeeping entries and filing of federal tax returns, which are performed on its behalf by employees of its parent, cannot apportion its income under RCW 82.04.460.**

***Wilderness Cruises, Inc. v. State of Washington, Department of Revenue*, Docket No. 50589, July 31, 1998. Where apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total costs of doing business both within and without the state. The department's cost-base method apportions administrative costs to Washington and assumes operating costs are incurred evenly as the vessels are operated.**

***Foster Pepper & Shefelman v. State of Washington, Department of Revenue*, Docket No. 54866, June 2, 2000. If a taxpayer seeks to apportion its service income it must either maintain a place of business in another state or country or render services out-of-state that are more than "incidental."**

Administrative Decisions (e.g., WTDs):

**Determination No. 86-267, 1 WTD 241 (1986) - A person with no place of business or employees and engaging in no business activities in this state is not taxable with respect to interest on loan payments the right to which was purchased from a Washington bank, despite the presence of the buyers and loan collateral in this state.**





**Determination No. 85-308A and 86-20A, 1 WTD 415 (1986) - Amounts derived from allocating computer services between affiliated companies within and outside this state are apportionable based upon the locations where such services are performed, in order to determine the measure of service B&O tax.**

**Determination No. 86-297, 2 WTD 23 (1986) - The determination was reviewed but the ruling is no longer valid. This determination held that a business cannot apportion income earned for services provided out-of-state, for B&O purposes, if the taxpayer does not maintain a place of business in that state. (See Determination No. 87-186, 3 WTD 195 (1987)).**

**Determination No. 87-98, 2 WTD 439 (1987) - If an out-of-state business performs services in Washington for an out-of-state recipient, the income from those services are subject to Washington's B&O tax.**

**Determination No. 87-186, 3 WTD 195 (1987) - Apportionment may not be denied solely because a taxpayer does not maintain a place of business outside of Washington.**

**Determination No. 87-346, 4 WTD 267 (1987) - A taxpayer operating a hotel reservation system is entitled to apportion income it receives from customers for their proportional share of service provided to the taxpayer by an out-of-state third party. This determination has been overruled or modified in part by Determination No. 93-269ER, 14 WTD 153 (1995).**

**Determination No. 88-233, 6 WTD 59 (1988) - Royalties derived from granting the right to use a patented process are not taxable by Washington where the grantor's domicile, legal or commercial, is outside of Washington. Patents are intangible personal property whose situs is the domicile of the owner. Income derived from intangible property is attributed to the domicile of the owner of the property under the doctrine of mobilia sequuntur personam.**

**Determination No. 88-476, 7 WTD 91 (1988) - When a Washington business performs services out-of-state, its income is not subject to Service B&O tax without regard to whether or not the taxpayer has a place of business in the out-of-state location.**

**Determination No. 89-286, 8 WTD 7 (1989) - Commission income is apportioned by separate accounting methods unless it is not practical, then the cost method may be used. If the cost method is used, the ratio of the cost of doing business in this state to the total cost of doing business both within and without this state is multiplied by total income.**

**Determination No. 89-448, 8 WTD 189 (1989) - The cost of doing business for the cost apportionment formula under Rule 194 includes third party costs which are attributed to the location of the office for which the expenses were incurred.**



**Determination No. 89-459, 8 WTD 227 (1989) - The determination was reviewed but one holding of the ruling was overruled by 89-459A, 11 WTD 17 (1991). A bank which had previously requested and received Department approval to use a three factor formula to apportion income, permitted to switch to a cost method. Under the cost method, total income is apportioned by using an apportionment percentage that is obtained by dividing in-state costs by total costs. Deductions, but not exemptions, are taken after application of apportionment percentage. Under a cost method of apportionment, interest costs incurred by a bank are allocated to location where funds are used; administrative costs of loan are allocated to location where costs were incurred [overruled by 89-459A, 11 WTD 17 (1991)].**

**Determination No. 89-509, 8 WTD 345 - Where a taxpayer has places of business in Washington and Alaska which contribute to the performance of a service, the commissions earned are taxable on an apportionment basis.**

**Determination No. 89-525, 8 WTD 411 (1989) - A "place of business" held to include the home of the Washington employee/shareholder of an out-of-state independent sales representative. A formal office is not required.**

**Determination No. 89-553, 9 WTD 039 (1989); Determination No. 93-132, 13 WTD 271 (1994) - A taxpayer who does not maintain a place of business outside the state is entitled to apportion service income when the out-of-state services performed are more than incidental.**

**Determination No. 90-132, 9 WTD 280-15 (1990) - Where a business has offices in both Washington and Oregon attributing sales by the "sold to" box on an invoice is an acceptable method of separate accounting where the in-state administrative offices render no services to the customer (the administrative services by the business in-state offices serve the salespersons and the taxpayer).**

**Determination No. 90-163, 9 WTD 286-39 - To comply with RCW 82.04.460 and to be accepted by the department, separate accounting methods must accurately show the income attributable to activities engaged in Washington. Merely separating income by where the underlying transaction occurred does not constitute separate accounting methods when in-state activities contribute to the earning of the income.**

**Determination No. 89-459A, 11 WTD 17 (1991) - Under the cost method of apportionment, interest costs incurred by a bank are apportioned in the same manner as all other expenses, to the location where services associated with that expense were performed. Interest expenses are apportioned to the location that incurs the payroll and property expenses in managing the borrowing activities that give rise to the interest expense. Overruling section 3 of Determination No. 89-459, 8 WTD 227 (1989) concerning allocation of interest expense.**



**Determination No. 91-177, 11 WTD 219 (1991) - That portion of income derived from interest on installment sales which is attributable to business activities within the state, other than the sale itself, is subject to Service B&O tax.**

**Determination No. 91-309, 11 WTD 497 (1992) - If a business creates a subsidiary to administer an ERISA qualified medical plan and the services are partially or wholly rendered outside Washington, Rule 194 apportionment rules would apply.**

**Determination No. 92-004, 11 WTD 551 (1992) - Authors who operate their corporation solely from their Washington residence and who sold their written works after they moved to Washington are not entitled to apportion income notwithstanding the fact that incidental promotional services are rendered elsewhere.**

**Determination No. 92-117, 12 WTD 147 (1993) - Third party costs in the nature of commissions to out-of-state independent salespersons are not allocable to another state when they were not incurred because of taxpayer's out-of-state activities.**

**Determination No. 92-252E, 12 WTD 417 (1992) - Payments to a foreign subsidiary to provide services from an out-of-state facility for the benefit of the overall operation of a corporation domiciled in Washington are included in the numerator as the cost of doing business within the state when apportioning income under the cost method.**

**Determination No. 92-262E, 12 WTD 431 (1992) - A taxpayer is entitled to apportion its gross receipts between Washington and other state(s) only if the taxpayer is directly and actively engaged in business in the other state(s) and from such activity it derives some part of its gross receipts. When a taxpayer's sole connection with another state is the payment of third party service provider costs, the taxpayer is not entitled to apportion out the costs associated with that service provider. When a Washington taxpayer contracts with independent businesses in other states to perform services in those states for the taxpayer's purpose of realizing or continuing valuable contractual relationships there, nexus may be found. However when the independent businesses are not chosen because of their location or to enter and maintain a place in the market of the other state, but rather for their independent expertise, then nexus is not created. An apportionment formula is required only when another state may constitutionally impose a tax. When no other state may constitutionally tax the activities of a Washington business, the state of Washington may tax 100% of its gross receipts. The costs incurred by a Washington state business for the acquisition of third party services must be attributed to the state which generates the business to which the services relate.**

**Determination No. 92-363, 12 WTD 519 (1992) - Costs attributable to a facility located out-of-state were correctly excluded from the apportionment formula, where the facility did not contribute to generating the income sought to be apportioned.**

**Determination No. 93-172, 13 WTD 180 (1993) - Income from a separate business activity is apportioned using only the costs related to that business activity.**



**Determination No. 92-372, 13 WTD 219 (1994) - Separate accounting methods must accurately reflect that portion of gross receipts from services rendered in Washington by using the same standards to determine whether the receipts generated are from out-of-state services or are from services performed in Washington when apportioning income.**

**Determination No. 93-276, 13 WTD 392 (1994) - A taxpayer was allowed to apportion commission income earned by its traveling sales staff where the out-of-state services being performed by that staff involved out-of-state solicitations for advertising placed into out-of-state directories.**

**Determination No. 93-325, 14 WTD 082 (1994) - A taxpayer may use separate accounting to apportion its gross income to Washington if that accounting is accurate or clearly reflects services performed in Washington.**

**Determination No. 94-023, 14 WTD 191 (1995) - Out-of-state corporation may apportion monthly fees it receives from Washington subscribers who pay for the right to access its out-of-state computer facilities.**

**Determination No. 94-031, 14 WTD 194 (1995) - Apportionment may not be denied solely because a taxpayer does not maintain a place of business outside this state if it performs substantial services outside Washington for out-of-state customers. Taxpayer shall apportion income by separate accounting methods, if practical. Otherwise, taxpayer shall apportion income on the cost-of-doing business basis. Merely separating commission income by where the sale occurs does not constitute separate accounting.**

**Determination No. 98-022, 17 WTD 336 (1998) - A separate accounting method, based upon the location of services billed to clients, accurately apportioned service income.**

**Determination No. 98-195, 18 WTD 342 (1999) - Amounts received for the payment of software royalties or licenses are allocated to the domicile of the software owner and are not apportioned.**

**Determination No. 98-196, 19 WTD 19 (2000) - Washington-based securities dealer is entitled to apportion its gross receipts between Washington and the numerous other states in which it markets securities through independent sales representatives that own and operate their own offices. The securities dealer has taxable nexus with those other states by entering their marketplaces to sell its services and products to customers in those states. Such out-of-state activities are more than incidental.**

**Determination No. 99-108, 19 WTD 143 (2000) - A joint venture may apportion its gross revenues where it maintains places of business both within and without Washington that contribute to the rendition of services within Washington.**



**Determination No. 99-220, 19 WTD 355 (2000) - A taxpayer who is engaged in business only in Washington, who derives commission income from out-of-state sales by downstream distributors in a multi-level marketing network by virtue of his recruitment, training, and motivational activities performed entirely in Washington, may not apportion the commission income between Washington and other states where sales occur.**

Attorney General's Opinions (AGOs): **None found.**

Other Documents (e.g., special notices or Tax Topic articles, statutes or regulations administered by other agencies or government entities, statutes, rules, or other documents that were reviewed but were not specifically relevant to the subject matter of the document being reviewed):

**Tax Topics      90-Q4 Service businesses may apportion when significant services are performed out-of-state.**  
**91-Q2 Commission from out-of-state sales.**  
**93-Q3 Apportionment of Service Income.**



**Review Recommendation:**

- ☒ Amend
- ☐ Repeal
- ☐ Leave as is
- ☐ Begin the rule-making process for possible revision. (Applies only when the Department has received a petition to revise a rule.)
- ☐ Incorporate ancillary document into a new or existing rule. (Subject of this review must be an ancillary document and not a rule.)

**Explanation of recommendation:** (If recommending an amendment of an existing rule, provide only a brief summary of the changes you've identified/recommended earlier in this review document.)

**The department should revise this rule to incorporate useful information from the ETAs, WTDs, and BTA decisions identified in Section 3, above. While the rule is clear and well organized, as described in Section 4 there are examples provided in the rule that no longer reflect the department's interpretation of RCW 82.04.460.**

**11. Manager action:** Date: \_\_\_\_\_

☐ Reviewed recommendation      ☐ Accepted recommendation

☐ Returned for further action

Comments: